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In The

Supreme Court of the United States

October Term, 1998

STATE OF NEW MEXICO DEPT. OF PUBLIC SAFETY, DARREN P. WHITE, in his capacity as Secretary of the New Mexico Department of Public Safety, and FRANK TAYLOR, in his capacity as the Chief of the New Mexico State Police,

Petitioners,

vs.

STEPHEN R. WHITTINGTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION I:

WHETHER CONGRESS ACTING PURSUANT TO THE COMMERCE CLAUSE, U.S. CONST., ART. I, § 8, HAS THE POWER TO FORCE THE STATES TO SUBMIT TO UNCONSENTED FAIR LABOR STANDARDS ACT, 29 U.S.C § 201 *ET SEQ.* DAMAGES SUITS IN THE STATES' OWN COURTS.

QUESTION II:

WHETHER THE COMMON LAW AND STATUTORY IMMUNITY POSSESSED BY THE STATE OF NEW MEXICO IMMUNIZES THE STATE FROM FAIR LABOR STANDARDS ACT SUIT IN STATE COURT TO THE SAME DEGREE THAT THE ELEVENTH AMENDMENT IMMUNIZES THE STATE FROM FAIR LABOR STANDARDS ACT SUIT IN THE FEDERAL COURTS.

QUESTION III:

WHETHER THE REQUIREMENTS OF THE SUPREMACY CLAUSE, THAT STATE COURTS ENFORCE FEDERAL LAW, ARE TRIGGERED WHEN THE CONGRESSIONAL ABROGATION OF THE STATES' SOVEREIGN IMMUNITY TO SUIT CONTAINED IN THE FAIR LABOR STANDARDS ACT IS AN INVALID EXERCISE OF THE COMMERCE CLAUSE POWER.

QUESTION IV:

WHETHER THE SUPREMACY CLAUSE REQUIRES THE STATE COURTS TO ADJUDICATE FAIR LABOR STANDARDS ACT CLAIMS AGAINST THE STATES DESPITE THE FACT THAT THE STATE HAS SPECIFICALLY REFUSED TO WAIVE ITS IMMUNITY TO ANALOGOUS STATE STATUTORY ACTIONS.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, Defendants-Appellees below are the New Mexico Department of Public Safety, Darren P. White, in his capacity as Secretary of the New Mexico Department of Public Safety, and Frank Taylor, in his capacity as Chief of the New Mexico State Police.

Respondents, Plaintiffs-Appellants below are Stephen R. Whittington, Rudolf Acosta, Martin DeAmusategui, Richard M. Anglada, Alan L. Apodaca, Guy E. Archuleta, Nick Armenta, Rocky Arries, Manaces Arteaga, Salvador Asebedo, Jr., Dennis D. Bailey, Cleo A. Baker, John Balderston, David A. Baldridge, Freddie Barela, John A. Barnes, Randall L. Bertram, Eugene Bess, William D. Bolich, Michael E. Bowen, William Charles Bower, William Jack Bratcher, John Briscoe, Dennis W. Brown, Robert C. Brown, Michael D. Browning, Kevin Bruno, Kenneth David Bryant, Duane Bullion, Pete H. Bustamante, Gary Carson, Ramon N. Casuas, Jr., Ronnie F. Castillo, Eugene B. Catanach, Florian Chavez II, George E. Chavez, Joshua Chavez, Levi M. Chavez, Ronald E. Chavez, Chris C. Clements, Donald A. Collier, Gerald Robert Cook, James R. Coon, Robert H. Cron, Jr., Steve Culberth, William H. Cunningham, Donald D. Day, Charles Devine, Thomas J. Dobson, Michael R. Dowd, Richard W. Durham, Keith J. Duncan, Robert A. Duncan, Charles B. Eiland, Keith Elder, Jonathan B. Facteau, Jeff S. Faison, Eddie M. Flores, Scott E. Ford, E.J. Fouratt, Michael J. Francis, James Frietze, Gene Galassini, Fernando R. Gallegos, Noe Galvan, Jr., Edward R. Garcia, Eric F. Garcia, Ronald G. Garcia, Patrick M. Garrett, Donald Garrison, Jimmy K. Glascock, Oscar R. Gonzalez,

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PETITION FOR WRIT OF CERTIORARI

The New Mexico Department of Public Safety, et al. – the defendants in the trial court and the appellees in the court below – respectfully petition for a *writ of certiorari* to review the decision of the New Mexico Court of Appeals in this case.

OPINIONS BELOW

The decision of the New Mexico Court of Appeals in *Whittington, et al. v. New Mexico Department of Public Safety, et al.*, 1998 NMCA 156, 966 P.2d 188 (App. 1998), *cert. denied*, No. 25,364 (Oct. 14, 1998) is reprinted in its entirety at Appendix A hereto ("Pet. App."). The decision of the district court for the Ninth Judicial District, County of Curry, Judge Lynch of the Fifth Judicial District sitting by designation, is unreported and is reprinted at Appendix B hereto. The order of the New Mexico Supreme Court denying defendants-appellees' petition for *certiorari* is unreported and is reprinted at Appendix C hereto.

JURISDICTION

The New Mexico Supreme Court entered its order denying *certiorari* on October 14, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RULE 29.4(b) CERTIFICATION

Since 28 U.S.C. § 2403(a) may apply and the United States is not a party hereto, copies of this *certiorari* petition are being served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8 of the United States Constitution provides, in pertinent part:

> [T]he Congress shall have power . . . to regulate Commerce . . . among the several States.

* * *

Article VI, Clause 2 of the United States Constitution provides, in pertinent part:

> This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

* * *

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

* * *

The Fair Labor Standards Act at 29 U.S.C. § 207 states in pertinent part:

> (a) employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> > (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any work week is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a work week longer than 40 hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one-and-one-half times the regular rate at which he is employed.

The Fair Labor Standards Act at 29 U.S.C. § 216(b) provides, in pertinent part:

> Any employer who violates the provisions of [29 U.S.C] Section 206 or Section 207 . . . shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages. . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

The Fair Labor Standards Act at 29 U.S.C. § 216(c) provides in pertinent part:

> The Secretary [of Labor] may bring an action in any court of competent jurisdiction to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages.

* * *

New Mexico Statutes Annotated, § 50-4-22 (Michie 1978 (Repl. 1993)) ("the Minimum Wage Act") provides in pertinent part:

> C. No employee covered by the provisions of Subsection A of this section shall be required to work more than forty hours in any week of seven days, unless he is paid one-and-one-half times his regular hourly rate of pay for all hours worked in excess of forty hours.

New Mexico Statutes Annotated, § 50-4-21 (Michie 1978 (Repl. 1993)) provides in pertinent part:

> As used in the Minimum Wage Act . . .
>
> B. "employer" includes any individual, partnership, association, corporation, . . . employing one or more employees . . . but shall not include the United States, the state or any political subdivision thereof . . .

STATEMENT OF THE CASE

Petitioner, the New Mexico Department of Public Safety, (hereinafter, "DPS"), is a New Mexico state agency

which employs New Mexico state police officers. Petitioners Darren P. White, Secretary of the New Mexico Department of Public Safety, and Frank Taylor, Chief of the New Mexico state police, are sued in their official capacities. Respondents are 229 state police officers employed throughout the State of New Mexico.

On September 18, 1996, Stephen Whittington, the named plaintiff, and approximately 228 state police officers (hereinafter, "Respondents"), filed suit against the DPS, its Secretary and its Chief, for unpaid overtime, attorney fees, liquidated damages and injunctive relief for the State's alleged violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, *et seq.*

On October 3, 1996, the State removed the case to federal court pursuant to 28 U.S.C. § 1331. On April 7, 1997, the federal district court granted the State's motion to remand in light of this Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress lacked the power, when legislating pursuant to the Commerce Clause, to abrogate the State's Eleventh Amendment immunity to suit.

After remand to state court, Petitioners moved to dismiss the Complaint on the grounds that the State of New Mexico, as a sovereign entity, is immune from FLSA suit by private litigants without the consent of the State legislature and that Congress has no authority, under the Commerce Clause, to override the State's immunity to suit.

On November 5, 1997, the New Mexico state district court granted the State's motion to dismiss for lack of subject matter jurisdiction finding the case "dominated

by the Supreme Court's recent decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)" *(Appendix B at 11)*. The state trial court dismissed all of Respondents' FLSA claims holding that the Commerce Clause did not afford Congress the power to abrogate the States' sovereign immunity to suit in state courts *(Appendix B at 24)*. The trial court also rejected Respondents' argument that the Supremacy Clause requires the state courts to adjudicate claims against the State for FLSA violations when Congress lacks Commerce Clause authority to require the States to submit to unconsented suit. In rejecting Respondents' Supremacy Clause argument, the Court held "[t]here is no principled way to take this case out of the reach of *Seminole Tribe*." *(Appendix B at 24)*.

Respondents appealed the trial court's dismissal to the New Mexico Court of Appeals. The United States' motion to participate as *amicus curiae* was granted, and the Department of Justice filed an *amicus curiae* brief for the United States.

On September 3, 1998, a three-judge panel of the New Mexico Court of Appeals unanimously reversed the trial court's dismissal of Respondents' FLSA claims, holding that "the Supremacy Clause requires the district court to enforce the FLSA notwithstanding the Department's assertion of state sovereign immunity." *(Appendix A at 8)*. The court relied for its Supremacy Clause holding on *Hilton v. South Carolina Public Railways Comm'n.*, 502 U.S. 197 (1991) and *Howlett v. Rose*, 496 U.S. 356 (1990).

The appellate court did not dispute Petitioners' explication of the State's common law and statutory immunity

to unconsented FLSA suit[1], but held that "[u]nder present United States Supreme Court decisions, state sovereign immunity does not bar federal claims in state court." *(Appendix A at 7).*

The appellate court also held the Eleventh Amendment inapplicable in state court, although the State had explicitly rejected the Eleventh Amendment as the basis for its immunity argument:

> It is not, as is clear from Judge Lynch's decision, that the Eleventh Amendment applies in state court. Rather, it is that the same constitutional principle of common law sovereign immunity, embodied in the Eleventh Amendment, prevents

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[1] In New Mexico, the State's sovereign immunity is a common law doctrine. *State ex rel. Evans v. Field*, 27 N.M. 384, 387, 201 P.2d 1059 (1921) ("It is a fundamental doctrine of common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission"). The New Mexico legislature has acted legislatively to restore the State's tort immunity when judicially abrogated, *see* NMSA 1978 §§ 41-4-1 *et seq.* (New Mexico Tort Claims Act); to specifically retain immunity when providing wage guarantees for employees, *see* NMSA 1978 §§ 50-4-19 *et seq.* (New Mexico Minimum Wage Act); and created specific statutory waivers of sovereign immunity. *See, e.g.*, NMSA 1978 § 37-1-23 (waiving State's immunity for certain contract claims). New Mexico's common law and statutory sovereign immunity closely parallels and protects the immunity afforded the States under the Eleventh Amendment. *Ramah Navajo School Bd., Inc. v. Bureau of Revenue*, 104 N.M. 302, 307, 720 P.2d 1243 (Ct.App. 1986) ("Sovereign immunity and Eleventh Amendment immunity are, of course, distinct concepts, but both immunities are designed to protect this same object – state government.")

> unconsented Fair Labor Standards Act ("FLSA") suits in state court against the State.

Petitioners' Answer Brief, p. 3.

Nor had the trial court relied on the Eleventh Amendment in its dismissal of Respondents' claims *(Appendix B at 24).*

On September 10, 1998, Petitioners filed a timely petition for *certiorari* which was denied by the New Mexico Supreme Court on October 14, 1998 *(Appendix C).*

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG STATE COURTS REGARDING THE QUESTION OF CONGRESS' POWER TO ABROGATE THE STATES' SOVEREIGN IMMUNITY TO UNCONSENTED FLSA SUITS IN STATE COURTS

On November 9, 1998, this Court granted *certiorari* in *Alden v. Maine,* 1998 ME 200, 715 A.2d 172 (1998), a case raising the identical questions raised by *Whittington. Jacoby, et al. v. Arkansas Dept. of Education,* 331 Ark. 508, 962 S.W.2d 773 (1998) *sub. nom. Arkansas Department of Education v. Jacoby, et al. (No. 98-04)* also involves this same issue. These three cases from Maine, Arkansas and New Mexico are only the first of a barrage of cases from the state courts determining the question of whether federal statutes passed under Congress' Commerce Clause power can require the state courts to hear claims against unconsenting States. The question flows inevitably from this

Court's Commerce Clause analysis and decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* held that the Indian Commerce Clause, art. I, § 8, cl. 3, did not empower Congress to abrogate Florida's Eleventh Amendment immunity to unconsented suit by its enactment of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA").

Seminole Tribe expressly overruled *Pennsylvania v. Union Gas*, 491 U.S. 1 (1989), the "only" case where "congressional abrogation of the State's Eleventh Amendment immunity" had been upheld. *Seminole*, 517 U.S. at 59 (Justice Souter dissenting). In overruling *Pennsylvania v. Union Gas*, the Court "reconfirm[ed] the background principle of state sovereign immunity embodied in the Eleventh Amendment . . . " *Id.* at 71-72 (footnote omitted).

The Tribe's position, based on *Union Gas*, that the States ceded their sovereignty to the federal government when they ratified the Constitution and granted Congress plenary power to regulate interstate commerce, was soundly repudiated:

> Manifestly, we cannot rest with the mere literal application of the words of § 2 of art. III, or assume that the letter of the Eleventh Amendment exhausts the restrictions upon suits against non-consenting states. Behind the words of the constitutional provisions are postulates which limit and control. . . . There is also the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a 'surrender of this immunity in the plan of the convention.'

Seminole Tribe of Florida v. Florida, 517 U.S. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 321-323 (1934) (Chief Justice Hughes)).

In response to *Seminole Tribe*, the lower federal courts dismissed a number of FLSA suits by individuals pending against the States for lack of subject matter jurisdiction. *See, e.g., Aaron v. State of Kansas*, 115 F.3d 813 (10th Cir. 1997); *Moad v. Arkansas State Police Dept.*, 111 F.3d 585 (8th Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996). While there was dicta in a few of these decisions airily stating that plaintiffs would still be free to file their FLSA claims against States in the state courts[2], the issue of congressional power to negate the States' sovereign immunity in the States' own courts has not been decided, as it must be, by this Court.

In *Alden*, the Maine Supreme Judicial Court ruled that Congress' Commerce Clause power was insufficient to require the state courts to adjudicate private FLSA claims against the State. The Maine court noted the inapplicability of the Eleventh Amendment in state court and held:

> [I]t is clear that we have looked to the Eleventh Amendment to define the contours of state sovereign immunity. If Congress cannot force the states to defend in federal courts against claims by private individuals, it similarly cannot force the states to defend in their own courts against

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[2] *See, e.g., Aaron v. State of Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) ("[T]he employee can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law.").

> these same claims. In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual. To hold otherwise, by concluding that a state, immune from suit in federal court, must defend against the same suit in its own courts, would effectively vitiate the Eleventh Amendment.

Alden v. State of Maine, 715 A.2d at 174.

The Supreme Court of Arkansas, while acknowledging the state constitutional immunity afforded Arkansas in its own courts, held that the Supremacy Clause prohibited unconsenting States from asserting sovereign immunity to FLSA suit in their own courts.

In reviewing the trial court's grant of dismissal, the Arkansas court relied on the same "plan of the Constitution" surrender explicitly rejected by this Court in *Seminole Tribe*. *See Jacoby v. Arkansas*, 962 S.W.2d at 777 ("[B]y empowering Congress to regulate commerce, the states necessarily surrendered 'any portion of their sovereignty that would stand in the way of such regulation.' " (quoting *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 288-89 (1973))).

Like Arkansas, the New Mexico appellate court, in overruling the trial court, relied solely on the Supremacy Clause. The New Mexico court did not deny that the State's sovereign immunity afforded the State protection from unconsented suit but chose not to address the issue of *Seminole Tribe's* limitations on Congress' Commerce

Clause power in the state court context. The court concluded only that the Supremacy Clause required the state courts to remain open to FLSA suits brought by individuals despite the fact that the States are immune from these same suits in federal court *(Appendix A at 8)*. The court did not address the State's immunity from similar suits in state court under the New Mexico Minimum Wage Act, NMSA 1978 §§ 50-4-19 – 50-4-30.

The Fair Labor Standards Act requires private and public employees to comply with federal minimum wage and overtime requirements. The statute allows for enforcement by private individuals in federal or state court, *see* 29 U.S.C. § 216(b) and by the Secretary of Labor. *See* 29 U.S.C. § 216(c). The questions raised by the State FLSA cases do not affect the Secretary's ability to sue the States. In fact, in *Employees v. Missouri Public Health Dept.*, 411 U.S. 279 (1973), Justice Douglas, after concluding that the Act, as then written, did not sufficiently demonstrate congressional intent to abrogate the States' immunity to suit, noted:

> In this connection, it is not amiss to note that s. 16(b) [29 U.S.C. § 216(b)] allows recovery by employees, not only of the amount of unpaid wages, but of an equal amount as liquidated damages and attorneys fees. It is one thing, as in *Parden*, [*Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 184 (1964)], to make a state employee whole; it is quite another to let him recover double against a state. Recalcitrant private employers may be whipped into line in that manner. We are reluctant to believe that Congress, in pursuit of a harmonious federalism, desired to treat the States so harshly. The

> policy of the Act so far as the States are concerned is wholly served by allowing the delicate federal-state relationship to be managed through the Secretary of Labor.

411 U.S. at 286; *see also Seminole*, 517 U.S. at 71 n.14.

Employees suing the States for FLSA violations in state courts seek to narrowly construe *Seminole Tribe* as an Eleventh Amendment case without application to the state courts. The *Seminole Tribe* majority, however, relied on well-established principles of sovereign immunity of which the Eleventh Amendment is but one exemplification. The States' common law sovereign immunity is the "constitutional postulate" that is embodied in the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 88. The Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather it reflects but one aspect of the State's inherent, more sweeping immunity from suits brought by private parties. It is standing sovereign immunity on its head to assert that it protects the States in its successor Eleventh Amendment form in federal courts but fades to impotence when asserted in its original stronghold, the state courts.

Seminole's sovereign immunity analysis went far beyond the effect of the Eleventh Amendment on the jurisdiction of Article III courts. Indeed, the Court stated that the Eleventh Amendment "[s]tands not so much for what it says, but for the presupposition . . . which it confirms" *Seminole Tribe*, 517 U.S. at 54 (quoting from *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991)), " . . . that each State is a sovereign entity in our federal system; and second, that '[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an

individual without its consent.' " *Seminole Tribe*, 517 U.S. at 54 (quoting from *Hans v. Louisiana*, 134 U.S. 1, 13 (1890)).

The State's sovereign immunity to suit in any court pre-exists and informs the Eleventh Amendment. *Seminole Tribe*, 517 U.S. at 54 (quoting *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 501 U.S. 139, 146 (1993) ("The amendment is rooted in a recognition that the States, although a union, maintain certain attributes of sovereignty, including sovereign immunity")). *Seminole's* reaffirmation of the dual sovereignty of the States and its recognition of the vitality of the States' sovereign immunity outside of the Eleventh Amendment context, led directly to the numerous trial court dismissals of FLSA claims against the States in state courts. *See Keller v. Dailey*, 1997 WL 781897 (Ohio App. 10 Dist., December 16, 1997) (sovereign immunity bars state-court action for money damages under the FLSA in state court of general jurisdiction; proper forum was state Court of Claims); *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997, *aff'd on other grounds* 1998 WL 834153 (Wis.App. 1998); *Alden v. State of Maine*, 1998 ME 200, 715 A.2d 172 (1998); *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct., February 17, 1998).

The New Mexico and Arkansas appellate courts ignored or reasoned away *Seminole Tribe's* forthright reinvigoration of the States' sovereign immunity and held that private FLSA claims against the States, this "new and

strange jurisdiction"[3] could go forward in state courts despite the States' immunity to unconsented suit. Maine remained faithful to the constitutional status of State sovereign immunity elucidated in *Seminole Tribe*. This conflict should be resolved in favor of a "harmonious federalism" that respects the State's immunity in its own courts.

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[3] *Hans v. Louisiana*, 134 U.S. 1 (1890), a case much discussed in *Seminole Tribe*, analyzed the States' pre-existing common law sovereign immunity as the constitutional basis for the Eleventh Amendment's prohibition of actions brought by citizens against their own States. In its analysis of the jurisdictional grant to the federal courts under the Judiciary Act, the Court stated:

> But besides the presumption that no anomalous and unheard-of proceedings or suits were intended to be raised up by the Constitution – anomalous and unheard-of when the Constitution was adopted – an additional reason why the jurisdiction claimed for the circuit court [over Louisiana] does not exist is the language of the act of Congress by which its jurisdiction is conferred. The words are these: The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, . . . arising under the Constitution or laws of the United States, or treaties, etc. – "Concurrent with the Courts of the several states." Does not this qualification show that Congress, in legislating to carry the Constitution into effect, did not intend to invest its courts with any new and strange jurisdictions? *The state courts have no power to entertain suits by individuals against the State without its consent.* Then how does the circuit court having only concurrent jurisdiction acquire any such power?

Hans v. Louisiana, 134 U.S. at 18 (emphasis added).

II. THE COURT SHOULD GRANT THE PETITION TO CORRECT THE NEW MEXICO COURT OF APPEALS' ERRONEOUS APPLICATION OF THE SUPREMACY CLAUSE TO DENY THE STATE THE SOVEREIGN IMMUNITY TO WHICH IT IS ENTITLED IN ITS OWN COURTS

The Supremacy Clause provides:

> This Constitution and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and Judges in every state shall be bound thereby, anything in the Constitution or the laws of the states to the contrary notwithstanding.

Under the Supremacy Clause, U.S. Const. Article VI, States have the coordinate authority and consequent responsibility to enforce the supreme law of the land in their courts "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Mondou v. New York, New Haven & Hartford Railroad Company*, 223 U.S. 1, 59 (1912).

The Supremacy Clause confers no power on Congress, *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), and cannot remedy an invalid exercise of Commerce Clause power. Because Congress lacks the constitutional power to abrogate the States' immunity to suit in the FLSA, § 216(b) of the Act is *ultra vires* and there is no "supreme" law to enforce.

In *Printz v. United States*, 117 S.Ct. 2365 (1997), the Supreme Court rejected a similar Supremacy Clause argument advanced by proponents of the "Brady Bill." *Printz*

held the gun control legislation unconstitutional because it impinged on the State's sovereign immunity by requiring state officials to conduct background checks under federal law. In rejecting the proponents' Supremacy Clause argument, the Court stated:

> The Supremacy Clause, however, makes "Law of the Land" only "Laws of the United States which shall be made in Pursuance [of the Constitution]"; so the Supremacy Clause merely brings us back to the question discussed earlier, whether laws conscripting state officers violate state sovereignty and are thus not in accord with the Constitution.

Printz, 117 S.Ct. at 2365, 2379.

When Congress purported to abrogate the States' immunity to FLSA suit in the States' own courts, it overstepped its Commerce Clause power. To this extent, 29 U.S.C. § 216(b) violates the Constitution. Congress' unconstitutional exercise of its Commerce Clause power cannot be redeemed by resort to the Supremacy Clause.

Even if it were applicable to the FLSA cases, the Supremacy Clause does not require a State to take jurisdiction over a federal cause of action when a neutral nondiscriminatory reason exists for declining jurisdiction. *See Herb v. Pitcairn*, 324 U.S. 117 (1945). "The requirements that a state court . . . treat federal law as the law of the land does not . . . include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented." *Howlett v. Rose*, 496 U.S. 356, 372 (1990).

The Supremacy Clause does not allow Congress to redefine the state court's existing jurisdiction and procedure to create a state forum for federal rights where none exists. When the subject matter of an action is not within the state court's jurisdiction, the state court's refusal to enforce a federal right is not a violation of the Supremacy Clause. *Douglas v. New York, N.H. & H.R. Co.*, 279 U.S. 377 (1929).

New Mexico's sovereign immunity defense does not discriminate against a federal right prohibited by the Supremacy Clause. New Mexico trial courts do not "otherwise" have jurisdiction of wage and hour claims against the State of New Mexico under state law. The only "like matter" to a FLSA claim in New Mexico, a statutory cause of action under the Minimum Wage Act, specifically exempts the State from suit. NMSA 1978 § 50-4-21 (1993). The sort of "discrimination" discussed and rejected in the Supremacy Clause cases occurs when the state court rejects the policy of the federal act or seeks to avoid crowding the state court's calendars. *See Howlett v. Rose*, 496 U.S. 356, 379 (1990). The courts of this State do not hear or adjudicate any state wage and hour claims against the State.

In rejecting the State's sovereign immunity argument, the New Mexico Court of Appeals relied on *Howlett v. Rose* for the proposition that state courts must always take jurisdiction over federal claims against States (*Appendix A at 7*). This is not the holding nor the reasoning of *Howlett*. *Howlett* held that Florida school board

defendants, *not clothed with the State's immunity*,[4] could not assert local government immunity as a defense to a § 1983 civil rights claim where the state court "otherwise" had jurisdiction over similar state tort claims against those same defendants.[5] *Howlett* did not involve the sovereign immunity of the State of Florida. *Howlett*, 496 U.S. at 377. ("Federal [§ 1983] law makes governmental defendants that are not arms of the State, such as municipalities, liable for their constitutional violations.")

Nor did the case involve Congress' Commerce Clause power. Florida attempted to extend immunity to "municipalities, counties and school districts *that might otherwise be subject to suit under Section 1983 in federal court.*" (emphasis added). *Howlett*, 496 U.S. at 366. *Howlett* rejected the local governmental immunity defense because this defense *would not* be available to the school district in federal court. The situation here is exactly the opposite. The State asks this Court to hold that the State's sovereign immunity defense, available to it under the Eleventh Amendment in federal court, is equally available to it in state court.

Another case relied on heavily by the New Mexico court, *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197 (1991), is a pre-*Seminole Tribe*, post-*Union Gas*

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[4] *See Howlett v. Rose*, 496 U.S. at 381 n.24.

[5] "[T]he Florida court's refusal to entertain one discrete category of § 1983 claims, when the court entertains similar state-law actions against state defendants, violates the Supremacy Clause." *Howlett v. Rose*, 496 U.S. at 375 (emphasis added).

Federal Employees Liability Act[6] (FELA) decision that does not mention or discuss the States' common law or statutory immunity to unconsented suit. In fact, there is no indication in the case that state sovereign immunity was raised or considered by the South Carolina Supreme Court.[7]

Hilton did not consider the question of congressional power to abrogate States' immunity to suit. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), only two years before, had held that "the principle of sovereign immunity found in the Eleventh Amendment" does not preclude Congress, acting pursuant to the Commerce Clause, from enacting statutes permitting suits for money damages against the States. *Union Gas*, 491 U.S. at 13-14. The only part of the two-part *Seminole Tribe* test even raised in *Hilton* was whether the FELA demonstrated a sufficient congressional intent to abrogate sovereign immunity. Because of its reliance on *stare decisis*, *Hilton* did not even determine whether the intent test was met in FELA. *Hilton*, 502 U.S. at 206-207.

Hilton and *Union Gas* both relied on the fiction of *Parden v. Terminal Railway of Alabama*, 377 U.S. 184

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[6] 45 U.S.C. §§ 51 *et seq.* and 45 U.S.C. § 56.

[7] The South Carolina Supreme Court affirmed the trial court's dismissal in a one-sentence *per curiam* opinion citing *Freeman v. South Carolina Public Railways Commission*, 393 S.E.2d 383 (1990), which held that the absence of unmistakably clear language showing Congress' intent to create a FELA claim against the State warranted dismissal. *Hilton* 502 U.S. at 201.

(1964),[8] rejected by *Seminole Tribe*, that "[T]he states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce." *See Union Gas*, 491 U.S. at 14, quoting *Parden*, 377 U.S. at 190. *Hilton's* reliance on the surrender theory is wholly untenable after *Seminole*. *See Seminole Tribe*, 517 U.S. at 61-62, 65-66.

The Supremacy Clause does not require the state courts to adjudicate all federal claims against unconsenting States. It cannot supply Congress with the power to abrogate the State's sovereign immunity nor can it require the State to submit to claims for which it is not otherwise liable under state law.

CONCLUSION

For the foregoing reasons, certiorari should be issued to the Supreme Court of the State of New Mexico so that this honorable Court may review and correct the decision below, and resolve the split among state courts on the question of a State's right to refuse to allow itself to be

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[8] *Parden* does not concern state court jurisdiction. *Parden* held that no clear statement by Congress of its intent to abrogate Eleventh Amendment immunity is necessary, a holding overruled in *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987), and that Congress has the power to abrogate the State's Eleventh Amendment immunity under the Commerce Clause to the extent the States are engaged in interstate commerce, *Welch*, 483 U.S. 478 n.8, a holding which cannot survive *Seminole Tribe*.

sued for FLSA claims by private individuals in the State's own courts.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number _____

Filing Date: _____

Docket No. 19,065

STEPHEN R. WHITTINGTON, et al.,

Plaintiffs-Appellants,

vs.

STATE OF NEW MEXICO DEPARTMENT. OF PUBLIC SAFETY, DARREN P. WHITE, in his capacity as Secretary of the New Mexico Department of Public Safety, and FRANK TAYLOR, in his capacity as the Chief of the New Mexico State Police,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY
William P. Lynch, District Judge

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OPINION

(Filed Sep. 3, 1998)

ALARID, Judge.

(1) On appeal we are asked to decide whether the Eleventh Amendment to the United States Constitution bars suit by a citizen against a state in state court. We must also decide the corollary issue of whether the Supremacy Clause supersedes state sovereign immunity and therefore requires state courts to enforce federal law. The district court dismissed the Appellants' (Employees) suit against the State of New Mexico Department of Public Safety (the Department), finding that the Eleventh Amendment granted sovereign immunity to states in both federal and state court. We reverse.

FACTS

(2) Two hundred ninety-nine New Mexico State Police Officers filed suit against the Department, Darren P. White, in his capacity as Secretary of the Department, and Frank Taylor, in his capacity as the Chief of the New

Mexico State Police, for violations of the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201-219 (1978). The Department removed the case to federal court and then moved to return it to state court in light of the United States Supreme Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44, 61-66 (1996), which held, among other things, that Congress cannot abrogate a state's sovereign immunity from suit in federal court pursuant to the Interstate Commerce Clause. The federal court granted the Department's motion, finding that based upon the holding in *Seminole Tribe*, the court did not have jurisdiction to hear the suit.

(3) Once back in district court, the Department moved to dismiss the Employees' claims for violations of the FLSA based on State sovereign immunity. The district court found that there was "no principled way to take this case out of the reach of *Seminole Tribe*," because "state sovereign immunity is synonymous with Eleventh Amendment immunity[.]" Employees appeal.

BACKGROUND

(4) We begin our discussion with a brief history of the Eleventh Amendment. For the first time, in 1793, the Supreme Court allowed a citizen of one state to sue another state in federal court. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The Court's holding "created . . . a shock of surprise." *Hans v. Louisiana*, 134 U.S. 1, 11 (1890). As a result, Congress introduced the language of the Eleventh Amendment, which was ratified in 1795. John V. Orth, *The Truth About Justice Iredell's Dissent in Chisholm v. Georgia* (1793), 73 N.C. L. Rev. 255, 256 (1994).

(5) The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. This language expressly discusses the judicial power of the United States. The language was later interpreted to bar suits by citizens against their own states in federal court. *Hans*, 134 U.S. at 10-17.

(6) The Eleventh Amendment is not an absolute bar to suits against a state in federal court. Congress may abrogate the state's sovereign immunity if it: (1) has the power to abrogate, and (2) its intent to abrogate is unmistakable. See *Seminole Tribe*, 517 U.S. at 55.

(7) In *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), the Supreme Court held that the Fourteenth Amendment gave Congress the power to abrogate the states' Eleventh Amendment sovereign immunity. Later, the Supreme Court held that the Interstate Commerce Clause was also a source for abrogation of sovereign immunity. *See Pennsylvania v. Union Gas*, 491 U.S. 1, 5 (1989) (plurality opinion), *overruled by Seminole Tribe v. Florida*, 517 U.S. at 66.

(8) In 1996, however, the Supreme Court overruled *Union Gas* in *Seminole Tribe*, 517 U.S. at 66. The Supreme Court concluded that unlike the Fourteenth Amendment, the Interstate Commerce Clause cannot serve as the basis for abrogating the states' Eleventh Amendment immunity. *Id.* Therefore, because the Interstate Commerce

Clause is no longer a source for abrogation, federal statutes passed pursuant to the Interstate Commerce Clause are not enforceable against the states in federal court.

ANALYSIS

a. Standard of Review

(9) The Employees' case was dismissed by the district court. The issue before us is a matter of law, which we review de novo. *See Barnae v. Barnae*, 1997-NMCA-077, ¶ 11, 123 N.M. 583, 943 P.2d 1036.

b. Federal Jurisdiction

(10) Under Eleventh Amendment analysis the FLSA meets the first criterion for Congressional abrogation. It is not disputed that Congress was clear in its intent to subject states to FLSA claims in both state and federal courts. *See* 29 U.S.C. § 216 (b); *Jacoby v. Arkansas Dep't of Education*, 962 S.W.2d 773, 774 (Ark. 1998). It is the second criterion that the FLSA does not satisfy. Congress passed the FLSA pursuant to the Interstate Commerce Clause. *Jacoby*, 962 S.W.2d at 774. In the aftermath of *Seminole Tribe*, it is clear that the Commerce Clause is not sufficient to give federal courts jurisdiction over suits by employees against state entities for violations of the FLSA. *Id.*

c. State Jurisdiction

(11) The Department contends that the Eleventh Amendment provides the State immunity from suits in state court for violations of the FLSA. We do not agree. The Eleventh Amendment is only a restriction on federal

court jurisdiction. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 n. 2 (1985) ("As Justice Marshall has noted, 'the issue is not the general immunity of the States from private suit . . . but merely the susceptibility of the States to suit before *federal tribunals.' Employees v. Missouri Dept. of Public Health and Welfare*, [411 U.S. 297,] 293-94 [(1973)] (concurring in result) (emphasis added). It denigrates the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land."). The Eleventh Amendment does not prevent state courts from addressing federal law claims because it does not apply to state court jurisdiction. *See Hilton v. South Carolina Pub. Rys. Commission*, 502 U.S. 197, 204-05 (1991) (the Eleventh Amendment does not apply in state courts); *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n. 7 (1980); *Jacoby*, 962 S.W.2d at 775; *Bunch v. Robinson*, 712 A.2d 585, 594 (Md. Ct. Spec. App. 1998). We do not read *Seminole Tribe* to the contrary. Consistent with the previous holdings of the Supreme Court, we find that the Eleventh Amendment does not give the Department sovereign immunity from suit in state court.

d. State Sovereign Immunity & The Supremacy Clause

(12) The Department argues that state sovereign immunity also protects the Department from suit in state court. We do not agree. The Supremacy Clause of the United States Constitution provides that the Constitution and the federal law of the United States are the supreme laws of the land and that courts in every state are bound by these

laws. U.S. Const. Art. VI, cl. 2. Under present United States Supreme Court decisions, state sovereign immunity does not bar federal law claims in state court. *See Howlett v. Rose*, 496 U.S. 356, 367-68 (1990); *Hilton*, 502 U.S. at 207; *see also Carter v. City of Las Cruces*, 121 N.M. 580, 582, 915 P.2d 336, 338 (Ct. App. 1996) (stating that state sovereign immunity is not a bar to Section 1983 claims in state court); *Wells v. County of Valencia*, 98 N.M. 3, 6-7, 644 P.2d 517, 520-21 (1982) (holding that denial of federal rights by a state violates Supremacy Clause).

(13) In *Howlett*, the Supreme Court was asked to determine whether state sovereign immunity barred 42 U.S.C. § 1983 (1979) claims in state court. The Court stated that when Congress has adopted an Act, Congress has spoken for the people and the states. Therefore, the Act is as much the policy of the states as it is of Congress and the states should respect the Act as if they had adopted it themselves. *Howlett*, 496 U.S. at 371. Because Section 1983 is the supreme law of the land, the states must enforce that law generally in their state courts. *Howlett*, 496 U.S. at 367.

(14) In *Hilton*, the Supreme Court reinforced its holding in *Howlett*. In *Hilton*, the Court was asked to determine whether a state could be sued for a Federal Employers' Liability Act claim in state court. Citing to *Howlett*, the Court ruled that under the Supremacy Clause when a federal statute imposes liability upon the states, that statute is fully enforceable in state court. *Hilton*, 502 U.S. at 207.

(15) When Congress enacted the FLSA, it clearly stated that it was to apply to the states in state court. The FLSA

therefore is the supreme law of the United States. "The Supreme Court has decided that Congress acted within its Article I powers and did not violate the Tenth Amendment when it provided state employees with the protections afforded by the FLSA." *Alden v. Maine*, No. CUM-97-446, 1998 WL 439259, *6 (Me. August 4, 1998) (Dana and Rudman, J.J., dissenting) (citing *Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985)). Accordingly, based on the previous decisions by the Supreme Court, we find that the Supremacy Clause requires the district court to enforce the FLSA notwithstanding the Department's assertion of state sovereign immunity. *See Alden*, 1998 WL 439259 (Dana and Rudman, J.J., dissenting).

CONCLUSION

(16) We agree that under the interpretation of the Eleventh Amendment in *Seminole Tribe*, federal courts do not have jurisdiction to hear claims against states for FLSA violations. We conclude, however, that the Eleventh Amendment does not bar suits against the state for FLSA violations in state court, nor does state sovereign immunity bar such suits. We therefore reverse the decision of the district court granting the Department's Motion to Dismiss and remand for proceedings consistent with this opinion.

(17) **IT IS SO ORDERED.**

/s/ A. Joseph Alarid
A. JOSEPH ALARID, JUDGE

WE CONCUR:

/s/ Harris L. Hartz
HARRIS L. HARTZ, Chief Judge

/s/ Michael D. Bustamante
MICHAEL D. BUSTAMANTE, Judge

APPENDIX B

NINTH JUDICIAL DISTRICT COURT
COUNTY OF CURRY
STATE OF NEW MEXICO

STEPHEN R. WHITTINGTON, et al.,

Plaintiffs,

CV-96-33906

vs.

STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, et al.,

Defendants.

ORDER GRANTING MOTION TO DISMISS FLSA CLAIMS

(Filed in Open Court Nov. 5, 1997)

Plaintiffs, 226 employees of the New Mexico State Police, filed suit against Defendants State of New Mexico, Darren P. White, in his capacity as Secretary of the New Mexico Department of Public Safety, and Frank Taylor, in his capacity as the Chief of the New Mexico State Police ("the State"). Counts I, III and IV of Plaintiffs' Second Amended Complaint seek recovery of compensatory and punitive damages, attorneys fees and injunctive relief under the Fair Labor Standards Act, 29 U.S.C. Section 201 *et seq.* ("FLSA" or "the Act"), while Count II seeks recovery based on a breach of contract theory. The State has moved to dismiss the FLSA claims on the ground that they violate the State's sovereign immunity from suit. This case raises complicated issues concerning the power of Congress to create a private cause of action against the states, the Eleventh Amendment, and common law state

sovereign immunity. For the reasons that follow, I will reluctantly grant the Motion by the State to dismiss the FLSA claims.

I. Congress's Power [sic] Abrogate State Sovereign Immunity.

This case is dominated by the Supreme Court's recent decision in *Seminole Tribe of Fla. v. Florida* , 116 S.Ct. 1114 (1996).[1] The Seminole Tribe sued the State of Florida and its Governor under the Indian Gaming Regulatory Act for failure to negotiate in good faith toward the formation of gambling compact. The State moved to dismiss the complaint, arguing that the suit violated its sovereign immunity from suit in federal court. The Supreme Court affirmed dismissal of the suit on Eleventh Amendment grounds. In resolving the case, the Court analyzed two issues: first, whether Congress had unequivocally expressed its intent to abrogate the states' sovereign immunity; and second, whether Congress had acted pursuant to a valid exercise of power. Concerning the first

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[1] My views on the extent of Congressional power, the Eleventh Amendment, and the common law doctrine of sovereign immunity are substantially the same as the views expressed by Justice Brennan in his opinion in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), and the views set out in the dissenting opinions by Justice Stevens and Justice Souter in *Seminole Tribe*, 116 S.Ct. at 1133, 1145. My primary areas of disagreement with the majority opinion in *Seminole Tribe* are detailed in footnotes 2-4, and additional authority for my views are cited therein. However, these views have been rejected by the majority in *Seminole Tribe*, and I am compelled to apply that decision.

issue, the Court found that Congress had in the Act provided an unmistakably clear statement of its intent to abrogate the states' sovereign immunity from suit. On the second issue, the Court held that the Eleventh Amendment confirmed that each state is a sovereign entity in the federal system, and that it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. The Court determined that the Indian Commerce Clause did not grant Congress the power to abrogate the states' sovereign immunity.

The *Seminole Tribe* majority held that the Eleventh Amendment restricts the power of Congress to create a private cause of action against the states.[2] The Court also

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[2] The Court is in error on this issue. The Eleventh Amendment restricts judicial power, but is not a limitation on Congressional power. As Professor Nowak explains in *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 Colum. L. Rev. 1413, 1441-42 (1975):

> The thesis of this Article is that the pragmatic problems of federalism posed by the eleventh amendment should be resolved by Congress, not by the judiciary. Congress is the only governmental entity which shares a dual responsibility to the state and federal systems and is accountable at both levels. The federal judiciary, on the other hand, is insulated from the influence of the states. Neither the federal nor state government has any practical recourse from an adverse ruling by the Court limiting or expanding congressional power and affecting the delicate balance between federal and state powers. There is then a real danger that judicial precedents will erect rigid principles of federalism ill-suited to a changing society. The early Court opinions dealing with the Commerce Clause, for example, demonstrate the

held that state sovereign immunity is an essential part of the Eleventh Amendment; in so doing, the Court

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danger of judicial assumption of ultimate responsibility for determining the parameters of federal power in relation to state sovereignty.

Based on these principles of federalism, the Court should read the eleventh amendment as a direct limitation on its own powers, but should not interpret it as a limitation on congressional power. A congressional grant of jurisdiction allowing a suit by a citizen against a state indicates that Congress has determined that the federal policy is preeminent and that the hardship on the state is not severe. The states may adjust to the congressional enactment or, if the regulation proves onerous, they may exert their influence on Congress to have it changed. On the other hand, judicial assumption of jurisdiction in suits against states leaves the states with no practical recourse. The history of Article III and the eleventh amendment appears to reflect these practical concerns. Following this historical and practical analysis, the Court should also take a limited role in reviewing congressional grants of jurisdiction allowing suits against states. This deference is appropriate since, again, it is Congress that is responsive to the influence of the states. Indeed the need for deference is even greater in these cases than it is in actions arising under Commerce Clause legislation. Laws enacted under the commerce clause may *sometimes* interfere with 'local activities,' but the creation of federal causes of actions against the states *always* involves the disruption of state activities by federal policies. The clear implication in the eleventh amendment context is that Congress did, in fact, determine that the federal policy should be preeminent and that the hardship on the state would not be severe.

"constitutionalized" the common law doctrine of sovereign immunity.[3] The Court specifically overruled its previous decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), in which it found that the Commerce Clause

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Emphasis in original. See also, Note: *State Sovereign Immunity: Myth or Reality after Seminole Tribe of Florida v. Florida?*, 46 Cath. U. L. Rev. 1005, 1048 (1997) ("Before *Seminole*, the Court had never construed the Eleventh Amendment to limit Congress's Article I powers. Congress enacted and the states ratified the Eleventh Amendment to limit expressly the federal courts' original jurisdiction set forth in Article III.")

[3] The Justices of the Supreme Court have for many years debated the extent to which the doctrine of state sovereign immunity is of constitutional dimension. The recent decisions setting out the debate include *Seminole Tribe, Pennsylvania v. Union Gas Co.*, and *Welch v. Texas Dep't. of Highways and Pub. Transp.* It is clear that if the doctrine of sovereign immunity is to have constitutional status, it must be judicially inferred. There is nothing in the original Constitution nor in any of the amendments that expressly sanctions the doctrine. No authority in New Mexico stands for the proposition that there is a constitutional dimension to sovereign immunity. *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975) ("As recognized by the district court, the doctrine of sovereign immunity is one of common law, judicially created. . . . It is a fundamental doctrine **at common law** and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission." Emphasis in original. 88 N.M. at 589). I cannot accept that the doctrine of state sovereign immunity is of constitutional dimension to bar congressional authority over the states. The last time the Court attempted to set proper standards for the exercise of state and federal authority, that experiment literally ended in disaster. John E. Nowak & Ronald D. Rotunda, *Constitutional Law*, Section 2.11, at 52 and n. 65 (5th ed. 1995).

granted Congress the power to abrogate state sovereign immunity.[4]

In determining how to apply *Seminole Tribe* to the present case, it is helpful to briefly review the history of the FLSA, cases involving the Eleventh Amendment, and New Mexico authority on state sovereign immunity.

A. History of the Fair Labor Standards Act.

The Fair Labor Standards Act was passed in 1938.[5] It required certain employers to pay their employees a minimum wage and also to pay them one and one-half times their regular rate of pay for hours worked in excess of 40 hours during one week. In its original form, the FLSA did not apply to a state or a political subdivision of a state. *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996).

In the 1960's Congress began to expand the FLSA to cover the states' relationship with their employees. The 1966 amendments to the FLSA extended minimum wage and overtime compensation to schools and hospitals,

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[4] Finally, the majority opinion in *Seminole Tribe* is inconsistent. The majority held that the Eleventh Amendment barred congressional abrogation of state sovereign immunity, but at the same time recognized that Congress had power under the Enforcement Clause of the Fourteenth Amendment to abrogate the Eleventh Amendment. Note: *State Sovereign Immunity: Myth or Reality after Seminole Tribe of Florida v. Florida?*, 46 Cath. U. L. Rev. 1005 (1997).

[5] The FLSA had been sponsored by Hugo L. Black before he was appointed to the United States Supreme Court, and was also known as the Black-Connery Act. Melvin I. Urofsky, *Division and Discord: The Supreme Court Under Stone and Vinson. 1941 - 1953*, at 137 (University of South Carolina Press 1997).

including those operated by the states and their political subdivisions. The Supreme Court held that the 1966 amendments were within Congress's power under the Commerce Clause, and declined to address the issue of whether FLSA violated the states' sovereign immunity from suit. *Maryland v. Wirtz*, 392 U.S. 183 (1968).

In 1973 the Supreme Court addressed whether the FLSA waived the states' immunity from suit in federal court under the Eleventh Amendment. The Court found no clear statement of congressional intent to abrogate the states' immunity, and held that a non-consenting state could not be sued by an individual citizen under the FLSA in federal court. *Employees v. Missouri Dept. of Pub. Health & Welfare*, 411 U.S. 279 (1973).

In 1974 Congress passed amendments to the FLSA that extended the minimum wage and maximum hour provisions to almost all public employees employed by the states and their various political subdivisions. The Supreme Court, in a 5-4 decision, found that the 1974 amendments were unconstitutional on the ground that they interfered with vital state functions in violation of the Tenth Amendment. In addition, the Court felt it must overrule the "far-reaching implications" of *Wirtz*. *National League of Cities v. Usery*, 426 U.S. 833, 840 (1976). Nine years later, in another 5-4 decision, the Supreme Court overruled *National League of Cities*. The Court held that the sovereignty of the states is limited by the Constitution, and that Congress had acted validly under the Tenth Amendment when it passed the 1974 amendments. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

B. History of the Eleventh Amendment.

Sovereign immunity in the United States has its antecedents in the British system, which recognized that the King or Crown could not be sued in its own courts. *Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114, 1146 (1996) (Souter, J., dissenting). There is no textual language in the Constitution nor in any of the amendments that expressly recognizes a doctrine of state sovereign immunity.

The Eleventh Amendment was ratified as a reaction to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, the Court held that Georgia was subject to suit by *Chisholm*, the executor for a South Carolina decedent who had delivered supplies to Georgia during the Revolutionary period. The Court refused to recognize the doctrine of state sovereign immunity, reasoning that Article III of the Constitution empowered federal courts to hear cases against a state.

The Eleventh Amendment, by its own terms, does not bar a citizen from filing suit against the state in which he lives.[6] In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court recognized that the text of the Amendment did not preclude a citizen from suing the state in which he lived. The Court reviewed the history surrounding the adoption of the Constitution, its prior decision in *Chisholm*, and the passage of the Eleventh Amendment and concluded that the spirit, not the letter, of the

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[6] The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of any Foreign State."

Amendment preserved state sovereign immunity in all suits brought by citizens against states. The Court broadly construed the Eleventh Amendment beyond its textual meaning to protect states against suits brought by individuals in federal court.

The Supreme Court has recognized several exceptions to the bar imposed by the Eleventh Amendment to suits by an individual against a state. The Court initially held that it may imply a waiver of the Eleventh Amendment when a state willfully engages in federally regulated activities. *Parden v. Terminal Ry. of Ala, Docks Dep't*, 377 U.S. 184 (1964). The Court subsequently overruled *Parden* on this issue, finding that Congress may abrogate state sovereign immunity only if the statute contains clear and unmistakable language demonstrating Congress's intent to abrogate state sovereignty. *Welch v. Texas Dep't, of Highways and Pub. Tramp.*, 483 U.S. 468 (1987). In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that the Enforcement Clause of the Fourteenth Amendment empowered Congress to abrogate state sovereign immunity. The Court reasoned that the Fourteenth Amendment was a direct limitation on the states' powers and an enlargement of Congress's powers, and determined that Congress was empowered to restrict states' rights under the special character of the Fourteenth Amendment.

In *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), the Court ruled that Congress could use its powers under the Commerce Clause to abrogate a state's Eleventh Amendment immunity if Congress expressed its intent in unmistakable language. Adopting the rationale known as the plan of convention theory, the Court determined that

when the states signed and ratified the Constitution, they ceded some of their immunity to Congress over the areas in which Congress has plenary authority. According to this theory, Congress can abrogate state sovereign immunity when legislating pursuant to ceded powers. This theory was specifically rejected by the Court in *Seminole Tribe*.

C. Sovereign Immunity in New Mexico.

For many years, New Mexico applied the doctrine of sovereign immunity to preclude suit against the State. In 1975, rejecting the "archaic view that 'the sovereign can do no wrong,' " the New Mexico Supreme Court abolished sovereign immunity in tort actions. *Hicks v. State*, 88 N.M. 588, 590, 544 P.2d 1153 (1975). The Court held that the decision would apply prospectively to tort claims accruing on or after July 1, 1976. The Legislature was in session in early 1976, and passed the New Mexico Tort Claims Act. The purpose of the Tort Claims Act was to reinstate the sovereign immunity which had been abolished by Hicks, subject to the exceptions in the Act. *Hydro Conduit Corp. v. Kemble*, 110 N.M. 173, 793 P.2d 855 (1990). Other statutes may also waive the States' sovereign immunity. *Luboyeski v. Hill*, 117 N.M. 380, 872 P.2d 353 (1994) (1983 amendments to the New Mexico Human Rights Act constitute a waiver of state sovereign immunity). Thus, by judicial abrogation and legislative action, the State has retreated, to some extent, from the absolute sovereign immunity it once enjoyed.

The New Mexico Legislature has not expressly waived the State's immunity to suit under the FLSA. In

fact, the New Mexico Minimum Wage Act, the state statute which encompasses FLSA-like claims, specifically excludes the State or its subdivisions from the definition of "employer" who may be sued under the Act. NMSA 1978, Section 50-4-21(B) (Repl. Pamp. 1993).

II. Does *Seminole Tribe* Preclude FLSA Suits in State Court?

Under *Seminole Tribe*, Congress can abrogate state sovereign immunity only where it has unequivocally expressed its intent to abrogate that immunity, and where Congress has acted pursuant to a valid exercise of power. The First, Sixth and Tenth Circuits of the United States Court of Appeals have held that Congress made clear in the FLSA its intention to override the Eleventh Amendment. *Mills v. Maine*, 118 F.3d 37 (1st Cir. 1997); *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996); *Aaron v. Kansas*, 115 F.3d 813 (10th Cir. 1997).[7] On the issue of whether the FLSA was passed pursuant to a valid exercise of power, these courts held that the FLSA was passed pursuant to the Commerce Clause, and rejected claims that it was passed pursuant to Section 5 of the Fourteenth Amendment. Because *Seminole Tribe* determined that the Commerce Clause does not provide Congress with the authority to abrogate a state's Eleventh Amendment immunity, the courts rejected the plaintiffs attempts to recover monetary damages for FLSA violations in federal court. *Id.*

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[7] *Contra, AFSCME v. Corrections Dept. of N.M.*, 783 F.Supp. 1320 (D.N.M. 1992).

With federal courts dismissing FLSA claims filed against the states in federal court, state courts have been grappling with the issue of whether Congress, in enacting the FLSA and its amendments, has abrogated the states' sovereign immunity to suit in state court. There is dicta in several cases that suggests that, under the Supremacy Clause, a state court of general jurisdiction is obligated to enforce the FLSA in state court to allow a remedy to an employee who is suing the state. *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973) (Marshall, J. concurring); *Wilson-Jones v. Caviness*, 99 F.3d 203 (6th Cir. 1996); *Aaron v. Kansas*, 115 F.3d 813 (10th Cir. 1997). However, trial courts in Wisconsin, Maryland and Maine have rejected this dicta and have applied the two part *Seminole Tribe* analysis to determine that Congress did not have the authority to waive their States' sovereign immunity from suit in state court. *German v. Wisconsin Dep't. Of Tramp.*, (Dane County, Wis. 96-CV-1261; March 10, 1997); *Bunch v. Robinson*, (Baltimore City, Md. No. 97006017/CE221886; Sept. 11, 1997); *Alden v. Maine*, (Cumberland County, Me.; July 21, 1997). The Maine court also rejected the Supremacy Clause argument, holding that the Supremacy Clause cannot be applied where the federal legislation is not authorized.[8]

To avoid this conclusion, Plaintiffs vigorously rely upon *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S.

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[8] However, according to Professor Nowak, if the Supremacy Clause is to have any meaning, state and federal courts must enforce rights against the states created by federal statutes that regulate the conduct of states. See Nowak, *supra* note 2, at 1443-46.

197 (1991). Hilton, an employee of a state-owned railroad company, sought to recover benefits under the Federal Employers' Liability Act ("FELA") from the State of South Carolina in state court. The State contended that it was protected by state sovereign immunity from suit in state court. In a decision that is less than a model of clarity, the Court held that FELA created a cause of action against the State that was enforceable in state court, relying on its' partially overruled decision in *Parden v. Terminal & of Ala, Docks Dep't*, 377 U.S. 184 (1964). The Court reached this decision by relying on "the central importance of *stare decisis* in this Court's jurisprudence," 502 U.S. at 201.[9] The Court also emphasized that it was not addressing the constitutional immunity from suit in federal court secured by the Eleventh Amendment, but was addressing a pure question of statutory construction.

Hilton was decided in 1991, and it is unlikely it is still good law after *Seminole Tribe*. If it is, it is distinguishable from the present case. The *Hilton* majority was reluctant to leave Hilton with no remedy, because workers compensation laws excluded coverage for railroad workers on the assumption that FELA provided coverage for those

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[9] This comment seems particularly ironic in light of the difficulty the Court has experienced in charting a course in the area of states' rights and Congressional power to abrogate state sovereign immunity. See: *Maryland v. Wirtz*, 392 U.S. 183 (1968), *overruled by National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Parden v. Terminal Ry. of Ala. Docks Dep't*, 377 U.S. 184 (1964), *overruled in part by Welch v. Texas Dept. of Highways and Pub. Trans.*, 483 U.S. 468 (1987) (a plurality decision); and *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe of Fla. v. Florida*, 116 S.Ct. 1114 (1996).

workers. In contrast, the FLSA provides alternative remedies to private suits against the states. Section 16 of the Act gives the Secretary of Labor authority to bring suit for unpaid minimum wages or overtime compensation, and Section 17 authorizes the Secretary to enjoin violations of the Act and obtain restitution in behalf of employees.[10]

Plaintiffs also argue that the State has waived its sovereign immunity and consented to suit under the FLSA because the legislature has consented to suit based on written contracts. NMSA 1978, Section 37-1-23(A) (Repl. Pamp. 1990). This argument ignores the fact that the FLSA is a federal statute, extended to the States by its 1974 amendments, and is not a contract between the State and Plaintiffs. Section 37-1-23 neither mentions the FLSA nor wage and hour claims against the State. Whether this statute waives sovereign immunity for the breach of contract theory set out in Count II of the Second Amended Complaint is not at issue at this time. Section 37-1-23 cannot be construed to waive sovereign immunity for the FLSA claims made by Plaintiffs.

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[10] The contention that the Secretary of Labor does not have sufficient staff to pursue FLSA violations, which will create a federal right without a remedy, has been rejected by the Supreme Court. *Employees v. Missouri Dept. of Pub, Health & Welfare*, 411 U.S. 279, 287 (1973).

III. Conclusion.

There is no principled way to take this case out of the reach of *Seminole Tribe*.[11] According to *Seminole Tribe*, Congress does not have power under the Commerce Clause to abrogate Eleventh Amendment immunity. Because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress does not have the power to abrogate the immunity of the State to be sued for damages under the FLSA in state court. Further, the State has not consented to suit or waived its immunity concerning the FLSA claims asserted by Plaintiffs.

IT IS THEREFORE ORDERED that the State's Motion to Dismiss Counts I, III and IV of Plaintiffs' Second Amended Complaint is **GRANTED**.

IT IS FURTHER ORDERED that there is no just reason for delay, and that, pursuant to Rule 1-054(C) NMRA 1997, this Order constitutes a final judgment on the FLSA claims contained in Counts I, III and IV of the Second Amended Complaint.

/s/ William P. Lynch
WILLIAM P. LYNCH
DISTRICT JUDGE

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[11] Justice Brennan noted that the law of the Eleventh Amendment exhibits a baffling complexity, replete with historical anomalies, internal inconsistencies, and senseless distinctions, and has become an arcane specialty of lawyers and federal judges. *Welch v. Texas Dep't. of Highways and Pub. Transp.*, 483 U.S. 468, 520, n.20 (1987) (Brennan, J., dissenting). The majority decision in *Seminole Tribe* only further confuses this difficult issue.

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APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, October 14, 1998

NO. 25,364

STEPHEN R. WHITTINGTON, et al.,

Plaintiffs-Respondents,

vs.

STATE OF NEW MEXICO DEPARTMENT OF PUBLIC SAFETY, DARREN P. WHITE, in his capacity as Secretary of the New Mexico Department of Public Safety, and FRANK TAYLOR, in his capacity as the Chief of the New Mexico State Police,

Defendants-Petitioners.

ORDER

This matter coming on for considering by the Court upon petition for writ of certiorari, and the Court having considered said petition and response, and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **19065.**

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By /s/ Jane Gurule
Chief Deputy

(2)

Supreme Court, U.S.
FILED
FEB 11 1999
CLERK

No. 98-1110

In The

Supreme Court of the United States

October Term, 1998

STATE OF NEW MEXICO DEPT. OF PUBLIC SAFETY, DARREN P. WHITE, in his capacity as Secretary of the New Mexico Department of Public Safety, and FRANK TAYLOR, in his capacity as the Chief of the New Mexico State Police,

Petitioners,

vs.

STEPHEN R. WHITTINGTON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

MEMORANDUM FOR RESPONDENTS

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5 pp

MEMORANDUM FOR RESPONDENTS

The respondents, Stephen R. Whittington, *et al.*, do not oppose the grant of the State of New Mexico Dept. of Public Safety *certiorari* petition in the instant case. The petition (at pp. 1-6) fairly states the procedural history and nature of this case. Respondents do object, however, to Petitioners' interpretation of the New Mexico Court of Appeals' decision and to the nature of the questions presented for review which are detailed below. So as not to burden the Court, we accept the statement, except portions specifically objected to, for present purposes.

We believe that the New Mexico Court of Appeals' decision, finding that state sovereign immunity does not bar suit based upon a federal statute, is entirely correct, both in its basics and in its understanding of this Court's precedents. If that decision stood alone, we would argue against further review by this Court on that ground.

We recognize, however, that the New Mexico decision does not stand alone and that state courts are in conflict across the country on this issue. This Court has obviously recognized such conflict and granted *certiorari* in *Alden v. Maine*, 715 A.2d 172 (Me. 1998). A petition for *writ of certiorari* is also pending in *Jacoby, et al. v. Arkansas Dept. Of Education*, 962 S.W.2d 773 (Ark. 1998) *sub nom. Arkansas Department of Education v. Jacoby, et al.* (No. 98-04). In both of the above cases, along with the present case, state employees brought state court Fair Labor Standards Act overtime pay lawsuits against a State. In *Alden*, the Maine Supreme Judicial Court upheld the State's sovereign immunity claim and dismissed the case. The Arkansas Supreme Court, however, like the New Mexico

Court of Appeals, held that state sovereign immunity was not a bar to such suits.

The Maine, Arkansas, and New Mexico cases all involve the question of the interplay between Congress' Article I legislative powers, state sovereign immunity, the Supremacy Clause of the United States Constitution and the effect of this Court's decision in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) on the Eleventh Amendment question. The Arkansas and New Mexico decisions are not only in conflict with the Maine decision over their basic outcomes, but also are in conflict over their understanding of this Court's precedents, Congress' Article I powers, and the role of state sovereign immunity in the federal system.

Respondents object to Petitioners' questions presented for review on the basis that they are repetitive and only serve to confuse and muddle the issue. Petitioners' four questions for review can more succinctly be stated as one question similar to that in *Alden* and *Jacoby* – "Whether a state court may refuse to entertain a federal statutory private party cause of action, such as a Fair Labor Standards Act suit, against a State or a state agency on the basis of state sovereign immunity."

We note that, while all three cases involve the same question for review, the *Alden* case presents a second question for review and involves different facts which may furnish a separate basis for decision in that case. The state courts of Maine entertain state statutory actions analogous to the FLSA which creates a second question

for review involving discrimination against federal statutory rights when similar state statutory actions are permitted. New Mexico and Arkansas do not have such state statutory provisions.

Maine and New Mexico also have very different bases for state sovereign immunity. Maine has a rich history of common law sovereign immunity which affords Maine the opportunity to argue that Maine's state sovereign immunity is synonymous with the Eleventh Amendment immunity. Respondents object to Petitioners' continual references in the Petition for *Writ of Certiorari* in this case to "common law" sovereign immunity in New Mexico, as this is not the law of the State.[1] Petitioners further mischaracterize the New Mexico Court of Appeals' decision by stating that the court "did not dispute Petitioners' explication of the State's common law and statutory immunity to unconsented FLSA suit." (*Whittington* Pet. pp. 6-7) A careful reading of the New Mexico Court of Appeals' decision shows that the words "common law" were never used to describe New Mexico's sovereign immunity. While Respondents feel that the common law versus statutory sovereign immunity

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[1] The New Mexico Supreme Court abolished common law sovereign immunity in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975). While the New Mexico legislature immediately acted to restore much of the State's sovereign immunity by statute, the New Mexico Supreme Court again reinforced that "common law" sovereign immunity, under either meaning of the term common law, was abolished by *Hicks*, leaving only statutory sovereign immunity. *Torrance Co. Mental Health Program, Inc. v. New Mexico Health and Environment Dept.*, 113 N.M. 593, 830 P.2d 145 (1992).

argument is irrelevant to a determination of the issue in this case, Respondents are calling this potential argument by Petitioners to the Court's attention to preserve the objection.

Due to the differences between the present case and *Alden*, the Court may wish to grant *certiorari* in this case and *Jacoby*, and consolidate all three cases for argument and consideration. Hearing all three cases together would allow the Court to consider and resolve all aspects of the issue in one proceeding.

CONCLUSION

In light of the foregoing, Respondents do not oppose a grant of the petition for *writ of certiorari* in this case.

Respectfully submitted,

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